89-315



No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MICHAEL S. ROBERTSON

V.

GASTON SNOW & ELY BARTLETT

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

Francis X. Nee
141 Tremont Street
Boston, MA 02111
(617) 426-4766

Of Counsel:

Daniel F. Featherston, Jr.
141 Tremont Street
Boston, MA 02111
(617) 426-4766

## QUESTION PRESENTED

1. When counsel was denied the right to make any final argument before the state court judge's decision, was there a *per se* violation of the Due Process Clause of the Fourteenth Amendment entitling the plaintiff to a new trial?[1]

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[1] "...[T]he caption of the case in this Court contains the names of all the parties." Rule 21.1 (b).

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Petitioner, Michael S. Robertson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, originally entered on April 6, 1989, on which a duly filed Petition For Rehearing was then denied on May 22, 1989.

## OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 404 Mass. 515,____ N.E. 2d_____ (1989), and a copy of the opinion appears in the separately presented Appendix hereto, pages 1-30.[2]

## JURISDICTION

The Massachusetts Supreme Judicial Court denied petitioner's timely-filed petition for rehearing on May 22, 1989 (App. 35-53), after its original judgment and opinion were entered on April 6, 1989 (App. 1), so this petition is timely filed, in accordance with the provisions of Rule 20.4. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), as petitioner claims that the judgment and

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[2]The Appendix will hereinafter be cited as "App.___", and because it is relatively "voluminous", is "separately presented", as per Rule 21.1 (K).

opinion of the highest court of the Commonwealth of Massachusetts deprive him of his rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America.

## CONSTITUTIONAL PROVISION

Section 1 of Amendment XIV to the Constitution of the United States of America -

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 14 Stat. 358; 15 Stat. 706-707.

## STATEMENT OF THE CASE

On October 21, 1985, after nine days of trial, a Massachusetts Superior Court jury returned a verdict for the plaintiff

for $500,000 on both the legal malpractice and misrepresentation counts against the defendant law firm.[3] The law firm filed a motion for a new trial, essentially based upon the insufficiency of the evidence, and eight months later--and then only after a mandamus action was threatened by the plaintiff against the trial judge--he allowed the defendant's motion for a new trial because the jury verdicts "are against the weight of the evidence" and "to prevent a failure of justice." The parties agreed to waive jury and have the retrial be on the basis of the jury trial transcript and exhibits, and that was done, the parties submitting detailed requests for findings and rulings to the judge in January, 1987.

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[3]As is the usual Massachusetts custom, a consumer protection count, under Massachusetts General Laws Chapter 93A, was simultaneously tried non-jury to the judge, he to make later findings and rulings on that action.

As had been specifically agreed to as a condition to proceed "jury-waived", and as was specified in correspondence of the trial judge and counsel, the only thing then left to be done before the court's decision was the scheduling of "final argument" of counsel. Wonderously, however, without any further word from or contact with the trial judge, and without allowing counsel to make final arguments, on March 18, 1987, the trial judge filed his findings and rulings finding for the defendant law firm on both counts.

## Procedures Raising The Question Presented

A week later the plaintiff filed a Motion For A New Trial Or Other Appropriate Relief, which in the part relevant to the question presented said:

> [T]he court's decision and Order for judgment of March 18, 1987, constitutes such fundamental error that no procedural remedy

now exists, regretably, post-judgment, short of vacating judgment and reassigning the case to another justice for a new trial, in accordance with the provisions of M.R.Civ.P. 59. The plaintiff has, surprisingly, been denied the fundamental due process right of counsel to be heard in final argument before the case is decided--a right recognized and established, incidentally, in M.R.Civ.P. 51(a). Only a new trial before another justice can now remedy that constitutional error. Obviously, that necessary element of any meaningful working of the adversarial process cannot now be resurrected without a new trial before another justice. It would require godlike powers for this court to erase its existing findings and rulings. Any ex post facto argument would be but a pro forma exercise. Sadly, the genie is out of the bottle. Argument now can neither do justice nor construct the equally important appearance of justice. The mirror is cracked.

* * *

The initial specified constitutional error would seem so patent that hearing thereon should be unnecessary. The court might await defendant's response hereto (but a vitiating reposte seems nonexistent), but reassignment to one of the other two judges agreed upon by the parties in the initial

> Joint Request For Special Assignment for the new trial would seem, unarguably, the procedure now mandated.

The plaintiff also submitted supplemental requests for altered findings and rulings, denominating such alternative relief as "remedy...deemed so insufficient [given the "constitutional error"] it is here proposed only for appellate record purposes", the court heard counsel argue for the additional or altered factual findings, and on June 30, 1987, the judge entered a Memorandum and Order [App. 31-32] (the only document containing any trial court order or reference to the new trial sought because of the unconstitutional denial of the plaintiff's right to make final argument). In its relevant part, all it said was:

> I am not persuaded that there is any basis for another new trial. The plaintiff points to no authority which would suggest a contrary result.

> The motion for new trial is DENIED. Judgment is to enter for the defendants.

Plaintiff duly appealed, and the fourth Issue Presented in his brief (the first three relating to the substantive errors presented) was:

> 4. If the first three issues should, somehow, result in affirmances of the trial court actions, must, at least, a third trial be ordered, because the trial judge at the second trial committed constitutional error when he decided the case without permitting counsel to address the court in final argument?

The issue was briefed by the parties,[4] argued on January 4, 1989, and on April 6, 1989, the Massachusetts Supreme Judicial Court handed down its opinion and judgment affirming the judgment for the defendant below. (App. 33-34 ). The court's

[4]This Court's opinions cited, infra, were cited in plaintiff's briefs and equally supportive Massachusetts opinions.

opinion acknowledges that the instant constitutional error was duly raised both in the trial court and on appeal (App. 4-6). Only three decisional sentences of the opinion relate to the question presented to this Court, the first two comprising footnote 7 and the third consisting of the penultimate summary sentence of the opinion (App. 26; 30); they say:

> [7]The plaintiff argues on appeal that, "[i]f [Gaston Snow] is not held liable, the court must, at the very least, order a third trial, because the denial of plaintiff's right to make final argument at the...jury-waived trial" violated the plaintiff's right to due process. Without deciding whether the circumstances under which the judge decided the case constituted a deprivation of due process, we conclude that the plaintiff is not entitled to a third trial since our review of the case is, in effect, de novo.
>
> Since the plaintiff has briefed and argued in this court that he is entitled to de novo review, and we have afforded him de novo review, we need not reach the plaintiff's claim that he did not have the opportunity to

present final argument until after the judge had rendered his decision.

On April 19, 1989, the plaintiff duly filed a Petition For Rehearing with the Massachusetts Supreme Judicial Court, mounting as his first ground "The 'per se' constitutional error", and arguing that "[a]t the very least [i.e., if the substantive errors were unavailing], it is simply impossible for the court not to order a new trial." The plaintiff refocused the authorities argued in his briefs (including the decisions of this Court) and added the United States Court of Appeals cases cited infra. On May 22, 1989, the Massachusetts Supreme Judicial Court simply "denied" the Petition For Rehearing (App. 35-53).

That recounts the only two essential facts relevant to the question presented herein: that the plaintiff was denied the right to make final argument before

decision (without waiver and without cause) and that stark error "was timely and properly raised", Rule 21.1(h), in the state court proceedings.[5]

## REASONS FOR THE ALLOWANCE OF THE WRIT

In refusing the new trial relief mandated because of the patent denial of due process effected in denying the plaintiff his right to make final argument

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[5] In an excess of caution, although it is immaterial to the procedural error presented herein, the Court should be advised that the Massachusetts Supreme Judicial Court's recounting of the substantive evidence in its opinion "totally ignores most of the plaintiff's compelling evidence [that easily convinced the jury of the defendant's liability]...and unfairly characterizes the evidence it does describe", a disheartening aberration the plaintiff argued in detail to the court in his Peitition For Rehearing (Emphasis in original). For the Court's information, plaintiff's Petition For Rehearing is set out in full in the Appendix, pages 35-53, the court's skewed evidentiary presentation argued in 2. (The letter form of presenting a Petition For Rehearing is required by Massachusetts Rules of Appellate Procedure 27.) This Court is assured that there are no substantive facts lurking in or de hors the record which would in any sense make just or fair the defendant's escaping liability in this case.

the Massachusetts Supreme Judicial Court "has decided a federal question in a way in conflict with applicable decisions of this Court", Rule 17.1(c), and "in conflict with the decision of another state court of last resort or of a federal court of appeals", Rule 17.1(b). In fact, the "conflict" is with every other reported decision--there is no authority to support this aberrational state court decision.[6] The error is so clear and the rule of constitutional law so settled, plaintiff presumes to suggest that the Court afford him the required relief by utilizing summary disposition: a Memorandum Decision allowing this petition, vacating the judgment and remanding with instructions

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[6]Note, that the Massachusetts Supreme Judicial Court opinion does not assay to cite any supporting authority for its decision on this issue (App. 26), nor could the defendant in its brief to the court. That is not oversight; there, literally, is no authority constructing any prophylactic for this fundamental a constitutional error.

that a new trial be ordered. Accord Trout v. Lehman, 465 U.S. 1056 (1984); Neese v. Southern Railway Company, 350 U.S. 77 (1955). The need for remedy is compelling, but the Court's overburdened time need not be utilized to brief and argue the case only to reiterate established law.

And the law is established. Perhaps the best modern opinion of this Court establishing that "the right to be heard" is a fundamental right included in the Due Process Clause of the Fourteenth Amendment is Powell v. Alabama, 287 U.S. 45 (1932). The Court's ultimate holding was that it was a denial of due process for a state not to appoint counsel in a capital criminal case where the defendants were young, ignorant, and incapable of retaining private counsel, Id. at 71, but the right to have counsel appointed was deduced from the more fundamental due process rights, first established, of "the

assistance of counsel" and "the right to be heard." Without counsel appointed, there was no one to render the mandated "assistance", no one to be "heard." Id. at 67-68; 72. With instant relevance, the Court made it clear that "the right to be heard" by counsel arose out of the civil common law. The Court established that in England, from before 1688, "parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel" and cited an unbroken skein of its own civil opinions and those of state and lower federal courts which all recognized that "the assistance of counsel" and "an opportunity of being heard" "never has been doubted... [to] constitute basic elements of the constitutional requirement of due process of law." Id at 60; 68-70. The Court announced explicitly that this constitutional

process, the right to be "heard"--was due in all cases, saying, on page 69:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. (Emphasis supplied).

The Court has long recognized that "the right to be heard" in final argument is included in the integument of Due Process fundamental to the factfinding process, be it civil or criminal. For example, the Court said in Hovey v. Elliot, 167 U.S. 409 at 419 (1897):

> If the court had the power to [render a decree as punishment for contempt]...by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to antoher without hearing or without process of law.

See also Windsor v. McVeigh, 93 U.S. 274 277 (1896) (decision of court pronounced

against party without hearing him "is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.")

In Herring v. New York, 422 U.S. 853 (1975), the Court specifically applied this general due process principle to the denial of final argument in a non-jury trial, the exact same situation presented in this case, holding that "[a] New York law conferr[ing] upon every judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment", Id. at 853, was unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment and vacated the judgment. Id. at 865. The Court said, on pages 858-859:

> There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial....The

> issue has been considered less often in the context of a so-called bench trial. But the overwhelming weight of authority, in both federal and state courts, holds that a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense.

Nothing, of course, turns constitutionally on the fact that it happened that the Court explicated the precept in Herring in the context of a criminal case. Implicit throughout its Herring opinion, and echoing Powell, is the Court's recognition that it is but making a discrete application of a fundamental general principle of justice: "the traditions of the adversary fact-finding process"; "the adversary system's commitment to argument"; "summation of the evidence at the close of trial"; "a criminal trial...is in the end basically a fact-finding process"; "there can be no justification for a statute that empowers a trial judge to deny absolutely the opportunity

for any closing summation at all." Id. at 857, 860-863.[7]

There remains only to dispose of the Supreme Judicial Court's baseless mechanism to avoid recognition of the unarguable constitutional error when there is "a total denial of the opportunity for final argument." Herring v. New York, supra, 859. The court held, in one sentence of a

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[7] Ironically, one of the leading state cases recognizing that civil litigants have a constitutional right to final argument was a decision of the Massachusetts Supreme Judicial Court itself--seven years even before Powell v. Alabama, supra. In Pizer v. Hunt, 253 Mass. 321, 148 N.E. 801 (1925), the court said, on page 322:

> The defendant has cited numerous decisions of the Supreme Court of the United States to the effect that State courts cannot enter judgment without giving parties an opportunity to be heard, and that such action amounts to deprivation of property without due process of law, or infringement of equal protection of the law in violation of rights secured by the Fourteenth Amendment to the Constitution of the United States.(8 citations omitted)...Of course we accept the principles declared in these decisions in all their amplitude.

Pizer was, of course, prominently relied upon by this petitioner in his Supreme Judicial Court briefs.

footnote and with no citation of authority: "...we conclude that the plaintiff is not entitled to a third trial since our review of the case is, in effect, de novo" (App. 26, n. 7)[8] That is a totally invalid basis to avoid the new trial, however, a ploy--as a matter of established constitutional law.[9] The Herring holding is that the denial of the right to final argument is so

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[8]The plaintiff had argued to the court that under the established Massachusetts standard of appellate review of a nonjury decision, when the evidence is wholly documentary, as it was here, the "clearly erroneous" standard to reverse the trial judge is replaced by a de novo review by the appellate court. Without even accepting that de novo review was required, in the sentence to which this quoted footnote is the footnote, the court simply held that "even if we apply the de novo standard, we reach the same conclusions as the trial judge" (App. 25-26).

[9]It also, of course, flies in the face of the logic and common sense upon which the rule of law is grounded: had the plaintiff been accorded the right to make final argument to which he was constitutionally entitled, he may have prevailed at trial and never have had to run the gauntlet of any appellate review, or at least with the burden of reversal on the defendant.

fundamental a violation of due process that it is per se reversible error. (It was exactly that aspect of the holding that prompted then Mr. Justice Renhquist to dissent in Herring, joined by The Chief Justice and Mr. Justice Blackmun saying that: such due process errors should be assessed on a "case-by-case approach." Id. at 865-872.) It is established "black letter law" that denial of final argument is a per se constitutional error--nothing may thereafter sanitize or dissolve it--and "no matter how strong the case for the prosecution may appear to the presiding judge", as this Court said in Herring, at 858. United States v. Spears, 671 F.2d 991, 992, 994 (7th Cir. 1982) (given "Herring's emphasis upon the fundamental nature of the constitutional right of summation", "the Supreme Court held that it is per se reversible error"); Patty v. BordenKircher, 603 F.2d 587, 589 (6th Cir.

1979) (a new trial is required "no matter how strong the case" "may appear." "This is a per se rule.... The District Court erred, therefore, in applying the harmless error rule of Chapman v. California); Spence v. State, 463 A. 2d 808, 812 (Md. 1983) ("Depriving [a party] of this opportunity ["to argue before verdict"]... denies him a fair trial....It is clear if counsel must argue...after the verdict is announced, counsel will truly be 'whistling in the wind'.")[10]

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[10]Here, plaintiff's counsel used the metaphor, "Sadly, the genie is out of the bottle" in his motion for a new trial to the trial judge (App. 35-53).

Although, as demonstrated, it is legally immaterial, wisdom dictates that correction be made of a mischaracterization of the "oral argument" counsel made to the trial judge after his decision. In, supposedly, stating the facts, the state court opinion says, that after plaintiff filed his motion for a new trial because "the judge issued his decision without first giving the parties the opportunity for final argument [,t]he judge then scheduled a hearing at which both parties presented oral argument...." (App. 4-5) The implication is that that ex post facto "oral argument" comprehensively addressed all the issues. That is not true at all, as the plaintiff explained to the court in his Petition For Rehearing (App. 35-53, n. 1): only "the narrow matter of additions to and alterations of the court's findings and rulings....[were] addressed at the later 'oral argument'," although it was already constitutionally too late for any argument.

Ironically, again, one of the more scholarly recent state court decisions firmly holding that the denial of final argument is per se reversible constitutional error is the Massachusetts intermediate appellate court decision in Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 490 NE 2d, 1195 (1986). The opinion collects an array of federal and state authorities for the uniformly established rule, recognizes, on page 13, that the error is "irremedial", and concludes, on pages 22-23:

> It is generally accepted, as discussed earlier, that prejudice as a result of the denial of closing arguments is assumed; and that such denial never can be harmless error. As a result, we are precluded from concluding, on the basis of the trial judge's own say-so, that argument would in all likelihood have left him where it found him. Rather, having concluded that the judge's action amounted to a denial of the right, we are constrained to hold that the defendant was denied 'the basic right...to make his defense.' For us to conclude that this denial did not create a substantial likelihood of a miscarriage of justice would be, in effect, to

> reject the importance assigned to the right by the Herring decision (Emphasis supplied).

As the error is "per se", "irremedial", "never can be harmless error", the error can also not be erased by an appellate de novo review--even were it impeccably fair.

One cannot but stand in puzzled wonder at the Massachusetts Supreme Judicial Court's unexplained refusal to recognize the unarguably per se reversible constitutional error committed in this case. This Court should not permit this patent injustice to stand. This petition presents three of the "reasons that will be considered" to grant the writ, as specified in Rule 17.1(b) and (c). There is in this case simply no reason for the Court to demer, and summary disposition is perfectly appropriate.

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue and at the same time the Court should summarily reverse the judgment of the Massachusetts Supreme Judicial Court and remand with instructions to order that the plaintiff have a new trial.

Respectfully submitted,

Francis X. Nee
141 Tremont Street
Boston, MA 02111
(617) 426-4766

Of Counsel:

Daniel F. Featherston, Jr.

DATED: August 18, 1989

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Of Counsel:

Daniel F. Featherston, Jr.
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Boston, MA 02111
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APPENDIX

S-4946 S.J.C.

Michael S. Robertson

v.

Gaston Snow & Ely Bartlett

Suffolk. January 4, 1989 - April 6, 1989.

PRESENT: Wilkins, Liacos, Nolan, Lynch & O'Connor, JJ.

Attorney at Law, Negligence, Attorney-client relationship.
Negligence, Attorney. Deceit. Actionable Tort. Practice, Civil, New Trial, Trial jury-waived.

Civil action commenced in the Superior Court Department on December 28, 1982.

The case was tried before Lawrence B. Urbano, J. On retrial, the claims alleging malpractice and misrepresentation were heard by Thomas R. Morse, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Daniel F. Featherston, Jr., for the plaintiff.
Richard W. Renehan (Charles R. Dougherty with him) for the defendant.

LYNCH, J. The plaintiff, Michael S. Robertson, claims that the law firm Gaston

Snow & Ely Bartlett (Gaston Snow) is liable to him for malpractice, misrepresentation, and a vioaltion of G.L. c. 93A.[1] The malpractice and misrepresentation counts were tried to a jury. In answering special questions the jury found that: (1) there was an attorney-client relationship between the plaintiff and Gaston Snow; (2) Gaston Snow failed to exercise reasonable care in representing the plaintiff, (3) Gaston Snow's negligence proximately caused the plaintiff to lose his employment; (4) Gaston Snow intentionally or negligently misrepresented a material fact to the plaintiff about the prospects of employment; (5) Gaston Snow failed to disclose to the plaintiff a material fact about the prospects of employment; (6) the

[1]Prior to trial, the plaintiff waived two other counts which alleged an intentional interference with an advantageous business relationship and civil conspiracy.

the plaintiff justifiably relied on either Gaston Snow's misrepresentation or non-disclosure; (7) either the misrepresentation or nondisclosure caused the plaintiff to lose his employment; and (8) the plaintiff suffered $500,000 in damages. The judge, however, found in favor of Gaston Snow on the G.L. c. 93A count, based in part on his finding that there was no attorney-client relationship between the plaintiff and Gaston Snow.

Gaston Snow moved for a judgment notwithstanding the verdict and for a new trial on the malpractice and misrepresentation counts. The judge denied the motion for judgment notwithstanding the verdict because, "[i]f the jury believed all of the plaintiff's testimony and disbelieved all other evidence where conflicting, the plaintiff just passes the [judgment] N.O.V. test...." However, the judge allowed Gaston Snow's motion for a new trial,

ruling that the verdict was against the weight of the evidence, and that "the jury failed to exercise an honest and reasonable judgment in accordance with the principles of law applicable to these counts."

The new trial was conducted without a jury on the basis of the transcript from the first trial, the exhibits, certain stipulations, and one additional exhibit which had not been introduced at the first trial.[2] There was no live testimony. That trial judge found and ruled for Gaston Snow. The plaintiff filed a motion for a new trial "or other appropriate relief." The motion was based, in part, on the fact that the judge issued his decision without first giving the parties the opportunity for final argument. The judge then scheduled a hearing at which both parties presented

[2]Pursuant to a joint request for a special assignment, another judge in the Superior Court heard the retrial.

oral argument, and the plaintiff submitted a supplemental request for findings.

The judge issued a memorandum and order affirming his earlier decision and directed that judgment enter for Gaston Snow. The judge also denied the plaintiff's motion to alter or amend the findings and judgment. The plaintiff appealed, and we transferred the case here on our own motion. We affirm.

On appeal, the plaintiff argues that: (1) the first trial judge abused his discretion in granting Gaston Snow's motion for a new trial, and therefore, the jury verdict in favor of the plaintiff should be reinstated; (2) since the evidence at the second trial was entirely documentary, we should review the case de novo and, based on the de novo review, find Gaston Snow liable; (3) if we do not find in favor of the plaintiff, we should at least grant a new trial because the

second judge's failure to allow final argument before rendering his decision violated the plaintiff's due process rights, and (4) the first judge's findings on the G.L. c. 93A claim were clearly erroneous.

The relevant evidence can be summarized as follows. Robertson Factories, Incorporated (old corporation), was founded in 1925 by the plaintiff's father, C. Stuart Robertson (C. Stuart). The old corporation, whose primary business was manufacturing curtains, had as its principal customer Sears, Roebuck & Co. (Sears). The defendant Gaston Snow served as the old corporation's outside counsel from the mid-1970's until the corporate reorganization which took place in 1979. Gaston Snow also represented the plaintiff personally in various legal matters during the mid-1970's. But, as of 1979, all such representation of the plaintiff had ceased (except for the retention of his will

which Gaston Snow had previously drawn).

In April, 1979, at the request of the old corporation, Gaston Snow prepared an analysis for a proposed reorganization of the corporation. The analysis addressed three objectives: (1) to "[p]rovide a predictable income for all current stockholders"; (2) to diversify and increase the liquidity of the assets of the old corporation for estate tax purposes, and (3) to "deploy stock in ongoing management with possibility of substantial leveraged growth." The plan called for the sale of all the old corporation's assets to a new corporation, Robertson Factories, Inc. (new corporation), which would continue to operate the business and would be owned by members of the Robertson family active in the business, and senior, nonfamily members of the old corporation management, including William F. Washburn (Washburn).

In July, 1979, C. Stuart wrote to the plaintiff stating that senior managers at Sears wanted assurances that the plaintiff would not control the new corporation or be the one with whom they would be dealing. C. Stuart told the plaintiff that Sears wanted to work with Washburn, and further that, at the next meeting of the board of directors, Washburn would replace the plaintiff as president. At the next meeting, Washburn was elected president and chief executive officer, the plaintiff was elected chairman of the board, and C. Stuart became chairman of a newly-formed executive committee. Thereafter, the plaintiff wrote to his brother-in-law, Mr. James P. Whitters, III (Whitters), a Gaston Snow partner and a director of the old corporation, expressing concern about the proposed reorganization.

On October 31, 1979, the plaintiff met with Mr. Richard N. Hoehn (Hoehn) and

other Gaston Snow attorneys to discuss the restructuring. At the meeting the plaintiff raised, among other things, the question whether he or anyone else would receive an employment contract with the new corporation. While Hoehn indicated that the subject of an employment contract was reasonable, neither he nor any other attorney ever assured the plaintiff that he would receive an employment contract with the new corporation. At this meeting the plaintiff did not ask Gaston Snow to represent him individually in the restructuring, nor did Gaston Snow offer such representation.

Washburn told the plaintiff that he would have a position within the new corporation commensurate with his abilities, but if nothing could be found for him, the plaintiff would not have a job. He asked Washburn whether he knew of any position on that basis; Washburn told the plaintiff

there was nothing at that time.

On November 21, 1979, the plaintiff wrote a memorandum, which was read by Hoehn, detailing his concerns about the reorganization, including the issue of employment contracts for himself, Washburn, and Philip S. Robertson (Philip). After the November 28, 1979, shareholders' meeting, where the board of directors approved the restructuring, C. Stuart asked Washburn about the plaintiff's role in the new corporation. Washburn said that, because the new corporation was not going to be a family-run business, the plaintiff would have to convince the new ownership that he would earn any salary he received, which C. Stuart agreed was fair.

The written agenda for the closing did not include the topic of employment contracts, although the topic was included initially in a Gaston Snow memorandum outlining the sale. The plaintiff requested

received from Gaston Snow a sample employment agreement, which it had prepared for an unrelated transaction involving another client. Although the sample indicated a five-year term, which the plaintiff had suggested in his November 21, 1989, memorandum, several other aspects of the agreement indicated that it was inapplicable to either the plaintiff or the new corporation. The plaintiff never discussed the sample agreement with Hoehn or anyone else at Gaston Snow. Prior to the closing Washburn, the president and chief executive officer of the old corporation, told Hoehn that none of the officers or employees at the new corporation would have employment contracts. Gaston Snow did not disclose this information to the plaintiff.

The closing took place on December 27, 1979. The stockholders of the new corporation were the plaintiff (22.5%), his brother Philip (22.5%), Washburn (22.5%),

Whitters (5.25%), and seven other non-family members of senior management (27.25%). Thus, Robertson family members (the plaintiff, Philip, and Whitters) owned 50.25% of the new corporation stock. No one raised the issue of employment contracts at the closing.

In January, 1980, Philip Robertson, Whitters, Washburn, and two nonfamily shareholders executed a voting agreement which provided that, for a five-year period, if any three concurred on a candidate for the board of directors, the other two would also vote for that candidate. The agreement did not control the vote of the parties on any other matters. At Washburn's request, Gaston Snow drafted the agreement before the closing. Neither Washburn nor Gaston Snow told C. Stuart or the plaintiff about the agreement. In May, 1980, the directors of the new corporation, on Washburn's recommenda-

tion, voted to terminate the plaintiff's employment and to remove him as chairman of the board.

1. The motion for a new trial. It is a well-established principle that "[t]he granting or denying of a new trial on the ground that the verdict is against the weight of the evidence rests in the discretion of the judge." Bergdoll v. Suprynowicz, 359 Mass. 173, 175 (1971). See Hartmann v. Boston Hearld-Traveler Corp., 323 Mass. 56, 59-61 (1948); Perry v. Manufacturers Nat'l Bank, 315 Mass. 653, 656 (1944). In ruling on such a new trial motion "the judge must necessarily consider the probative force of the evidence and not merely the presence or absence of any evidence upon the disputed point." Hartmann v. Boston Hearald-Traveler Corp., supra, at 60. Ruling on a motion for a new trial presents a limited question of fact, because the

judge should not decide the case as if sitting without a jury; rather, the judge should only set aside the verdict if satisfied that the jury "failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law." Id. However, the application of this standard is within the sound discretion of the trial judge and the grant or denial of a new trial will be disturbed only if there has been an abuse of that discretion.[3] Id. at 60-61, and cases cited.

The plaintiff's claims were submitted to the jury on three theories. First, that Gaston Snow represented the plaintiff in relation to the restructuring of the old corporation and the plaintiff's prospective employment with the new corporation, and that Gaston Snow was negligent in that

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[3]The plaintiff argues that the first trial judge failed to apply the correct standard because his findings do not indicate that the jury verdict

Footnote continued

was "manifestly" or "greatly" against the weight of the evidence, which the plaintiff argues shows that the judge "was unaware that he could not just substitute his view of the facts for that of the jury." However, the judge's express finding that "the jury failed to exercise an honest and reasonable judgment in accordance with the principles of law applicable to these counts", indicates that he understood and applied the correct standard. See Hartmann v. Boston Herald-Traveler Corp., 323 Mass. 56, 60 (1948).

The plaintiff also urges us to adopt the more stringent standard used by Federal courts to review the granting, as opposed to a denial, of a motion for a new trial on the basis that the verdict was against the weight of the evidence. In the Federal courts a judge's discretion in granting a new trial is limited and a jury's verdict should not be set aside "unless it is quite clear that the jury has reached a seriously erroneous result." Coffran v. Hitchcock Clinic, Inc., 683 F.2d 5, 6 (1st Cir.), cert. denied, 459 U.S. 1087 (1982), quoting Borras v. Sea-Land Servs., Inc., 586 F.2d 881, 887 (1st Cir 1978). This less deferential review of orders granting new trials assures that judges will not "simply substitute [their] judgment for that of the jury, thus depriving the litigants of their right to trial by jury." Rosenfield v. Wellington Leisure Prods., Inc., 827 F.2d 1493, 1498 (11th Cir. 1987). However, even under the Federal standard, the "court's discretion to grant a new trial remains large, and will not be disturbed if reasonably based." Coffran v. Hitchcock Clinic, Inc., supra, at 6 n. 1. Because we conclude that, even under the less deferential Federal standard, it was not an abuse of discretion to grant Gaston Snow's motion for a new trial, we need not reach the issue whether we should adopt a less deferential standard of review.

representation. The second theory was that Gaston Snow intentionally or negligently made a false representation of a material fact to the plaintiff about his prospective employment with the new corporation. The third theory was that Gaston Show, under a duty to do so, failed to disclose to the plaintiff a material fact about this prospective employment with the new corproation. After reviewing the evidence, we conclude that it was not an abuse of discretion for the judge to conclude that the jury verdict was against the weight of the evidence, and thus we affirm the order granting a new trial.

a. Negligent representation. In order to find Gaston Snow liable, it must be shown that the plaintiff was a Gaston Snow client with respect to the restructuring of Robertson Factories in 1979 and the plaintiff's prospective employment with the new corporation and that Gaston Snow

represented the plaintiff's personal interest. DeVaux v. American Home Assurance Co., 387 Mass. 814, 187 (1983).

We recognize that the existence of an attorney-client relationship is a question to be resolved by the trier of fact, Page v. Frazier, 388 Mass. 55, 61 (1983), and that "the relationship can be implied from the conduct of the parties" and need not be expressed. Id. at 62. See DeVaux v. American Home Assurance Co., supra, at 817-818. However, we also recognize that "[a]n attorney for a corporation does not simply by virtue of that capacity become the attorney for...its officers, directors or shareholders." 1 R.E. Mallen & J.M. Smith, Legal Malpractice §7.6 (3d ed. 1989). Also, the fact that an attorney agreed to, or did, represent a client in a particular matter does not necessarily create an attorney-client relationship as to other matters or affairs of that client. DeVaux

v. American Home Assurance Co., supra at 816. n. 6.

To show the existence of an attorney-client relationship the plaintiff points to Gaston Snow's prior representation of him, the fact that Gaston Snow still retained the original of his will in its office, and the plaintiff's testimony that he believed that Gaston Snow would be representing his interests. Gaston Snow's evidence was that neither Philip Robertson nor Hoehn thought that the plaintiff was a client whose interests guided Gaston Snow's actions during the restructuring. Hoehn testified that Gaston Show was representing the interests of both the old and new corporations. His uncontroverted testimony was that, at no time during the reorganization process, did the plaintiff ever request personal representation, nor did Hoehn ever indicate to the plaintiff that Gaston Snow was representing his

interests. Regarding the sample employment agreement sent to the plaintiff, Hoehn testified that the plaintiff neither discussed it with him nor returned it completed with any personal information. It was also uncontroverted that Gaston Snow had no specific contract to represent the plaintiff in the reorganization, and that they billed the corporation for their services. In spite of several written and many oral communications between the plaintiff and the other participants, the plaintiff introduced no evidence of a specific reference to Gaston Snow as his personal counsel. His claim is essentially, therefore, that he thought that Gaston Snow represented him but that he failed to communicate this thought to anyone. On this evidence we cannot say that it was an abuse of discretion for the first trial judge to conclude that the jury's finding of an attorney-client relationship was

against the weight of the evidence.[4]

b. Misrepresentation. In order for the plaintiff to recover for either intentional or negigent misrepresentation, the plaintiff must prove that Gaston Snow falsely represented that the plaintiff would be employed in a position with the new corporation, and that he reasonably relied on such misrepresentation. Barrett Assocs. v. Aronson, 346 Mass. 150, 152 (1963). See Restatement (Second) of Torts §526 (1977). Even if we assure the questionable hypothesis that Gaston Snow's conduct constituted an implied representation, see Boston Five Cents Sav. Bank v. Brooks, 309 Mass. 52, 55-56 (1941), the evidence does not support a finding that the plaintiff reasonably relied to his

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[4]We note that the judge, as the trier of fact on the plaintiff's c. 93A claim, specifically found that "the plaintiff has failed to sustain his burden of proof that an attorney-client relationship was established pursuant to which [Gaston Snow] was to represent the plaintiff as an individual during the process of restructuring the family business."

detriment on any such representation. The plaintiff admitted that he received no assurances regarding employment with the new corporation. Also, the plaintiff knew Washburn was responsible for fixing the salaries of the other officers of the new corporation, and, in fact, voted in favor of conferring that responsibility on Washburn. More importantly, however, Washburn personally told the plaintiff that his job was at risk, and the plaintiff's letter of December 18, 1979, to his father voiced this concern.

c. Nondisclosure. This claim required a finding that Gaston Snow, having a duty to do so, failed to disclose a material fact to the plaintiff. Restatement (Second) of Torts §551 (1977). Since there was an insufficient basis for finding that an attorney-client relationship existed between the plaintiff and Gaston Snow, and because it was uncontroverted

that Gaston Snow represented the corporations during the restructuring process, any duty to disclose owed to the plaitniff would have had to have been as a nonclient.[5] We

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[5]We note that attorneys serving as counsel to a corporation owe a duty to act according to the interests of the corporation and not in the interests of a nonclient stockholder, director, officer, employee, or other representative of the corporation. See Evans v. Artek Syss. Corp., 715 F.2d 788, 792 (2d Cir. 1983), and sources cited.

On appeal the plaintiff argues that, even if there is no attorney-client relationship between himself and Gaston Snow, a duty to disclose arises from the duties inherent in the undisputed attorney-client relationship between Gaston Snow and both the old and new corporations. However, the plaintiff cannot assert, in this personal action, any alleged breach of duty Gaston Snow owed to the corporation. Any claim, made by a shareholder, based on Gaston Snow's failure to disclose to the corporation the voting agreement or the lack of employment contracts, must be through a derivative action. See Bessette v. Bessette, 385 Mass. 806, 809-810 (1982); Hirshberg v. Appel, 266 Mass. 98, 100-101 (1929); In re Nardone, 69 Bankr. 481, 486-487 (D. Mass. 1987); Karris v. Water Tower Trust & Sav. Bank, 72 Ill. App. 3d 339, 354 (1979); Bevelheimer v. Gierach, 33 Ill. App. 3d 988, 993-994 (1975). Compare Greening v. Klamen, 652 S.W. 2d 730, 733 (Mo. Ct. App. 1983) (shareholders could maintain personal action because of allegation that they paid retainer for personal representation).

recognized that an attorney owes a duty to nonclients who the attorney knows will rely on the services rendered. Page v. Frazier, 388 Mass. 55, 63-64 (1983). However, we recognized that, "where an attorney is also under an independent and potentially conflicting duty to a client," we are less likely to impose a duty to nonclients. Id. at 63. The evidence indicated that the plaintiff had over twenty years of business experience, that he admitted that Gaston Snow did a "top notch" job in achieving C. Stuart's three goals in the restructuring, and that in August, 1979, when the plaintiff knew Gaston Snow was working with his brother Philip and Washburn on the details of the reorganization, he did not protest his exclusion from these discussions. More importantly, C. Stuart told the plaintiff that the corporation's most important customer, Sears, wanted assurances that the plaintiff

would not control the business or be the person with whom they would have to deal. These are not the circumstances where attorneys should be charged with a plaintiff's "foreseeable reliance" on their services to a client. See Page v. Frazier, supra at 64-65.[6] On the basis of this evidence, it was not an abuse of discretion for the judge to conclude that the jury's finding that Gaston Snow owed the plaintiff such a duty to disclose was against the weight of the evidence.

2. The retrial. The second trial was jury-waived and was conducted on the basis of the written record of the first trial. The standard of review of findings

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[6] In Page v. Frazier, supra at 65, we noted that the plaintiffs in that case were warned that the attorney represented the bank's interest and that "the plaintiffs might retain their own attorney to represent their interests." Although Gaston Snow did not specifically advise the plaintiff to retain independent counsel to protect his personal interests in the restructuring, we have already indicated that any reliance on the part of the plaintiff was unreasonable, obviating the need for an express warning that the corporation and the plaintiff's interests varied.

of facts by a trial judge in a jury-waived case is set forth in Mass.R.Civ.P. 52(a), 365 Mass. 816 (1974): "Findings of facts shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The plaintiff asks us to deviate from this general rule and review this case de novo, because there was no live testimony at the second trial. See Ward v. McGlory, 358 Mass. 322, 323 (1970); Hiller v. Submarine Signal Co., 11 Mass. App. Ct. 845, 848 (1981); Muzichuk v. Liberty Mut. Ins. Co., 2 Mass. App. Ct. 266, 268-269 (1974). It is unnecessary for us to decide if in appropriate circumstances we might depart from the "clearly erroneous" standard of review where all the evidence was documentary because, even if we apply the de novo standard, we reach the same conclusions

as the trial judge.[7]

The judge found that there was no attorney-client relationship between the plaintiff and Gaston Snow with respect to the restructuring. We conclude that the judge's determination was correct. Gaston Snow's previous representation of the plaintiff did not, by itself, create an attorney-client relationship in which it was to protect his interests in the restructuring. See DeVaux v. American Home Assurance Co., 387 Mass. 814, 816 & n. 6 (1983). Furthermore, because the plaintiff never requested Gaston Snow to represent him in this matter, never was told that Gaston Snow would protect his interests, and was never billed for any services

[7]The plaintiff argues on appeal that, "[i]f [Gaston Snow] is not held liable, the court must, at the very least, order a third trial, because the denial of plaintiff's right to make final argument at the...jury-waived trial" violated the plaintiff's right to due process. Without deciding whether the circumstances under which the judge decided the case constituted a deprivation of due process, we conclude that the plaintiff is not entitled to a third trial since our review of the case is, in effect, de novo.

there is little basis to imply the existence of an attorney-client relationship.[8]

The judge also found that the plaintiff failed to prove all the elements of misrepresentation, and specifically found that, if the plaintiff did rely on Gaston Snow representation, "he did so unreasonably." Based on our review of the evidence and the rational inferences drawn therefrom, we agree with the judge that the plaintiff has failed to sustain his burden of proof. Neither the sample employment

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[8]We have previously stated that "[a]n attorney-client relationship may be implied 'when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance...In appropriate cases the third element may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it'." DeVaux v. American Home Assurance Co., supra at 817-818, quoting Kurtenbach v. TeKippe, 260 N.W. 2d 53, 56 (Iowa 1977).

agreement nor Gaston Snow's conduct at the October 31, 1979, meeting with the plaintiff can be said to constitute an implied representation that the plaintiff would receive an employment contract. More importantly, as we indicated in discussing the motion for a new trial, the evidence does not support a finding that the plaintiff reasonably relied on any Gaston Snow representation.

The plaintiff also asserts that Gaston Snow is liable because it failed to disclose the voting agreement between Washburn, Whitters, the plaintiff's brother Philip, and two other stockholders, and failed to disclose that there would be no employment contracts at the new corporation. As we stated earlier, the plaintiff cannot succeed on this theory because the evidence does not support his argument that Gaston Snow owed him, personally, a duty to make such a disclosure.

3. The G.L. c. 93A claim. The plaintiff alleged in his complaint that "Gaston Snow's actions and omissions in their legal representation of the plaintiff...constitute 'unfair or deceptive acts or practices in the conduct of any trade or commerce'," and therefore violate G.L. c. 93A, §2 (emphasis supplied). Thus, proof of an attorney-client relationship between the plaintiff and Gaston Snow is critical to the plaintiff's c. 93A claim. The first trial judge found in favor of Gaston Snow because, inter alia, the plaintiff failed to prove the existence of an attorney-client relationship. This finding cannot be set aside "unless clearly erroneous." Mass.R.Civ.P. 52(a). Given our earlier discussion regarding this issue, the judge's finding was not clearly erroneous.

4. Conclusion. On the record before us we rule that there was no abuse of discretion by the first trial judge in

vacating the jury verdict on the ground that it was against the weight of the evidence. In reviewing the evidence submitted at the retrial, we reach the same conclusions as the second trial judge and, therefore, affirm the judgment entered in favor of Gaston Snow on the plaintiff's malpractice and misreprsentation claims. Since the plaintiff has briefed and argued in this court that he is entitled to de novo review, and we have afforded him de novo review, we need not reach the plaintiff's claim that he did not have the opportunity to present final argument until after the judge had rendered his decision. Also, the first trial judge's findings in favor of Gaston Snow on the plaintiff's G.L. c. 93A claim were not "clearly erroneous" and the judgment on that claim is affirmed.

So Ordered.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
CIVIL ACTION
NO. 59032

MICHAEL S. ROBERTSON

vs.

GASTON SNOW & ELY BARTLETT

MEMORANDUM and ORDER

This case was first tried to a jury before Urbano, J. There was a verdict adverse to the defendants and a motion for new trial was allowed by the trial judge. The parties then agreed that I should decide the case on the basis of the evidence set forth in the transcript of the jury trial instead of reintroducing the testimony with the same witnesses and exhibits. The Court accepted and approved that stipulation. The Court reviewed the entire transcript, made finding, and ordered judgment enter for the defendants. In making my finding I relied on the

evidence admitted and the reasonable inferences to be drawn and from the facts found.

I am not persuaded that there is any basis for another new trial. The plaintiff points to no authority which would suggest a contrary result.

The motion for new trial is DENIED. Judgment is to enter for the defendants.

*/s/ Thomas R. Morse, Jr.*
Thomas R. Morse, Jr.
Justice of the Superior Court

Dated: June 30, 1987

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss: SUPERIOR COURT
DEPARTMENT OF
THE TRIAL COURT
CIVIL ACTION
NO. 59032

MICHAEL S. ROBERTSON,

Plaintiff

V.

GASTON SNOW & ELY BARTLETT

FINAL
JUDGMENT

This case came on for hearing on Counts I and V, pursuant to an order dated October 16, 1986 granting a request for special assignment of those counts, following the decision of the Court, Urbano, J., dated June 24, 1986, ordering judgment to enter for the defendants on Counts II, III and IV, and thereupon, following findings of fact, rulings of law and order, Morse, J., dated March 18, 1987, which ordered judgment enter for the defendants on Counts

I and V, and a Memorandum and Order dated June 30, 1987 denying a motion by plaintiff for a new trial, it is now ordered that judgment be entered for the defendant on all counts.

By the Court

*/s/ Thomas R. Morse, Jr.*
Morse, J.

DATED: July , 1987

A TRUE COPY OF JUDGMENT ENTERED ON
JULY 14, 1987

LAW OFFICES OF
DANIEL F. FEATHERSTON, JR., P. C.

141 TREMONT STREET, BOSTON, MASSACHUSETTS 02111 • (617) 426-4766

DANIEL F. FEATHERSTON, JR
SUSAN S. RIEDEL
CHRISTOPHER L. MACLACHLAN

PATRICK RYAN
OF COUNSEL

April 19, 1989

The Honorable Herbert P. Wilkins
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Re: Robertson v. Gaston Snow
Supreme Judicial Court No. S-4946

My Dear Justice Wilkins:

Even were it to drain the reservoir of credibility hopefully established by undersigned counsel over decades, the plaintiff importunes the court to see that several oversights and misapprehensions in its opinion of April 6, 1989, require reconsideration, by way of this Petition For Rehearing, in accordance with Mass.R. App.P. 27. Unless these petitions have

become vestigial, this one should command attention.

1. The "per se" constitutional error - At the very least, it is simply impossible for the court not to order a new trial. When counsel's constitutional right to make final argument was denied, the trial judge committed "per se" constitutional error, an "irremedial" denial of fundamental due process. That cannot be gainsaid, yet the court's opinion undertakes to do so, burying the issue in a two-sentence footnote. No authority is cited for the court's failure to order a new trial, and none can be, for all the law commands it.

Plaintiff's briefs cite the leading United States Supreme Court opinions mandating a new trial, an opinion of this court, and Judge Armstrong's scholarly opinion, only three years ago, in Commonwealth v. Miranda, 22 Mass.App. Ct. 10

(1986). That opinion collects an array of Federal and state authorities for the uniformly established rule that such a denial of due process is "irremedial", requires a new trial, correctly holding:

> It is generally accepted, as discussed earlier, that prejudice as a result of the denial of closing arguments is assumed; and that such denial never can be harmless error....For us to conclude that this denial did not create a substantial likelihood of a miscarriage of justice would be, in effect, to reject the importance assigned to the right by the Herring decision [Herring v. New York, 422 U.S. 853 (1975)]. Id. at 22-23 (Emphasis supplied).

This is an established "black letter rule" of constitutional law, not something upon which courts may differ: United States v. Spears, 671 F.2d 991, 992 (7th Cir. 1982) ("[In Herring] the Supreme Court held that it is per se reversible error...."); Patty v. Bordenkircher, 603 F.2d 587, 589 (6th Cir. 1979):

> This is a per se rule. The Supreme Court has indicated that the strength of the prosecution's case is not a factor. The District Court erred, therefore, in applying the harmless error rule of Chapman v. California....

This court's opinion endeavors to avoid the mandated new trial by, sub silentio, "applying the harmless error rule of Chapman" in footnote 7 of its opinion: "...we conclude that the plaintiff is not entitled to a third trial since our review of the case is, in effect, de novo."[1]

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[1]The court implies in the first clause of that sentence that there may not have been "a deprivation of due process" because there was an "oral argument" after the second trial judge filed his findings and rulings without the promised "Final argument." On page 3 of its opinion the court makes it appear that that "oral argument" after "the judge issued his decision" was a comprehensive argument addressing all the issues. That is not so. Plaintiff's Motion For A New Trial Or Other Appropriate Relief, filed after the decision and before the "oral argument", specified that since he had been "denied the fundamental due process right of counsel to be heard in final argument...[o]nly a new trial before another justice can remedy that constitutional error", but asked to address the court regarding the narrow matter of additions to and alterations of the court's findings and rulings

This is a totally impermissible palliative to a "per se reversible error", given "Herring's emphasis upon the fundamental nature of the constitutional right of summation." United States v. Spears, supra, at 992 and 994. All courts have recognized that the error is absolutely "irremedial" upon occurrence, "per se", that this plaintiff does not have "to demonstrate prejudice", Adams v. Balkam, 688 F.2d 734, 739 n. 1 (11th Cir. 1982), and a new trial is required "no matter how strong the case" against him "may appear." Patty v. Bordenkircher, supra, at 589. The Appeals Court in Commonwealth v. Miranda, supra, well recognized the "irremedial" nature of this constitutional error; noting the Herring holding that "closing argument... is a basic element of the adversary fact-

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Footnote 1 continued
"only for appellate record purposes" (A. 157-165). That is all that was addressed at the later "oral argument." More fundamentally, of course, as the plaintiff's motion specified, "Any ex post facto argument would be but a pro forma exercise. Sadly, the genie is out of the bottle" (A. 158).

finding process", the court held, on page 23: "...we are precluded from concluding... that argument would in all likelihood have left him where it found him." (Emphasis supplied)[2] This court itself, fifty years before Herring, implicitly recognized, in Pizer v. Hunt, 253 Mass. 321 (1925), that it was "precluded" from trying to sanitize or hold "harmless" this "per se" constitutional error. This court simply must comply with the unarguable constitutional mandate in this case, if the jury verdict is not reinstated and the second trial proceedings mooted. To refuse to do so would be utterly lawless, and that is unthinkable.

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[2]One fo the supporting authorities collected in Miranda is Spence v. State, 463 A.2d 808 (Md. 1983), wherein the court held, at page 812, that a party "is constitutionally entitled to an opportunity" to argue before verdict, and that "[d]epriving him of this opportunity...denies him a fair trial.... It is clear if counsel must argue...after the verdict is announced, counsel will truly be 'whistling in the wind'." Argument here is as meaningless as argument in the trial court, since the judgment appealed from is void, "not entitled to respect in any other tribunal." Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

2. Attorney-client evidence - Reconsideration may obviate having to reach the constitutional issue, however. The court affirms the grant of a new trial on the "negligence" and "misrepresentation" counts because it says there was insufficent evidence for the jury to find that the plaintiff was a client of Gaston Snow and therefore owed a duty to disclose.[3] Justice Lynch's recounting of the evidence

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[3]Incomprehensibly, the court's opinion totally ignores the single most important thing that Gaston Snow did not "disclose"--what was the thrust of plaintiff's briefs. Besides not disclosing Washburn's secret order that the plaintiff would not have the employment contract he was led to believe he would have, Gaston Snow also kept secret the fact that they had eliminated, on Washburn's orders, the far more important matter of "Robertson family control" of the "new corporation." RFI had made that a sine qua non condition of the sale. The evidence of that key aspect of the restructuring was uncontradicted--confirmed by every witness and the exhibits--and admitted in defendant's brief. When Gaston Snow seretly prepared and had executed Exhibit 18, the totally illegal stockholders' agreement, "Robertson family control" was "gone" and total control of the "new corporation" handed over to Washburn, as Gaston Snow admitted. This secretly destroyed the RFI keystone of the sale and, admittedly, placed the plaintiff's prospective employment "further at risk." This whole aspect of Gaston Snow's shameful conduct, this vital "non-disclosure", is just written out of the court's opinion. That cannot be let stand.

"of an attorney-client relationship", however (Slip opinion, p. 11), is very slanted. It totally ignores most of the plaintiff's compelling evidence on this issue and unfairly characterizes the evidence it does describe, despite the fact that all this evidence was detailed with record references and discussed in plaintiff's brief. A member of the panel unfamiliar with the trial record would, understandably, find Justice Lynch's version of the facts supportive of the holdings, but that is insidious. Quite frankly, measured against the actual record evidence, the court's summary would constitute unfair, result-oriented, advocacy, much less a judicial presentaiton. The opinion does not mention the following evidence, compellingly supportive of plaintiff's case:

(a) Attorney Erik Lund, an impressively qualified expert witness, gave his opinion, on the basis of a hypothetical fairly encompassing all the

relevant facts, that the plaintiff "was or should have been considered a continuing client" of Gaston Snow (A. 1155-1178; 1182-1185). Other than Hoehn and Whitters'[4] self-serving testimony that they did not think that the plaintiff was a client, that most credible expert testimony was uncontradicted; the defense called no expert witness.

(b) Gaston Snow admitted that, given all the circumstances, "it would [have been] reasonable" "for Mike to think that Gaston Snow was taking his personal interests into consideration during the reorganization" (A. 731).

(c) Gaston Snow admitted that they knew Michael was relying on them to protect his interests (A. 728; 751-752; 1065-1066), and, after all, his brother-in-law was a partner.

(d) Gaston Snow admitted that even if there were only "a possibility of reliance" by Michael (who they knew was not represented by any other attorney) that they were acting as his attorneys or "a possible conflict of interest", they had "a duty" to tell Michael that

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[4]The court's recounting of the defense testimony on this issue begins (p. 11) with, "neither Philip Robertson nor Hoehn thought that the plaintiff was a client." The court somehow confused the plaintiff's brother, who was not a lawyer or a member of Gaston Snow, with his brother-in-law, Whitters, who was both.

he should secure separate counsel, yet they never said anything like that to Michael (A. 728-730; 1099-1100).

(e) Attorney Lund also gave his uncontradicted expert opinion that if, under the circumstances, Gaston Snow were not representing Michael, they had a professional obligation to so advise him, and tell him that his interests might be different from those they did represent,[5] and that he should get independent counsel (A. 1198-1199; 1204-1206).

(f) Michael sought Gaston Snow's advice about the RFI reorganization, as they had invited him to do, on several occasions, in detail and at length, and Gaston Snow gave him such advice (A. 510-512; 625-628; 631; 633-638; 1065-1066; Ex. 9, A. 303; Ex. 11, A. 305-307; Ex. 12, A. 308-309; Ex. 13, A. 310; Ex. 14, A. 313-319).

(g) Gaston Snow admitted that once a client relationship is established (as was admittedly done over many years prior regarding several matters), it does not vanish just because the client has not had occasion to use the lawyer's services for awhile (A. 705-710), and there

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[5]The plaintiff accurately argued to the jury (A. 1269-1270) that "Gaston Snow had another client, Bill Washburn;" "when Gaston Snow took their damaging instructions from Bill Washburn" "[h]e became their client", "they followed Bill Washburn's orders. He had become The Man."

> was not a scintilla of evidence that Michael's attorney-client relationship with Gaston Snow had, somehow, ceased.[6]

The court also denigratingly characterizes the only three kinds of evidence supportive of an attorney-client relationship (in addition to the seven described above, which the court chose to overlook) which it does report (p. 11). Michael convincingly detailed to the jury the fact

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[6]Plaintiff initially brought to the Appeals Court's attention a "significant authority", post-brief filings, which Mrs. Kennett assured counsel was in this court's materials after transfer (after it was brought to her attention in counsel's letter of December 8, 1988). In an authoritative article in Massachusetts Lawyers Weekly of August 29, 1988, 16 M.L.W. 2221, Daniel Klubock reviews the case law on the continuity of the attorney-client relationship, and concludes: "That is, we can say that the stronger the attorney-client relationhip, the longer the period of time before the client becomes a 'former' client. Second, we should consider other indicia of representation. Perhaps the client should be considered a current client so long as the lawyer keeps in his files any of the client's personal documents--whether will, trust, tax return, or deed." The court's opinion here recognized (p. 11) that Gaston Snow still held the plaintiff's will in its safe (from doing his estate plan a few years before). He could, therefore, even be held to still be a client as a matter of law.

that for almost a decade he had only used Gaston Snow when he several times needed legal advice (always, but for a local real estate matter)--they were not faceless strangers, and his brother-in-law was a partner--and Michael explained why he considered himself a client and relied on them (A. 433; 494-496; 681; 694-698; 715; 736; 869-870; 900-901; 1154). For the court to conclude (p. 11) that the plaintiff's evidence that there was an attorney-client relationship was "essentially, therefore, that he thought that Gaston Snow represented him but that he failed to communicate his thought to anyone", is very unfair and not even close to an accurate summary of what the evidence actually was. The court's marshalling of "Gaston Snow's evidence" is

equally unfair.[7]

The court correctly "recognize[s] that the existence of an attorney-client relationship is a question to be resolved by the trier of fact" and that "the relationship can be implied from the conduct of the parties" (p. 10). The jury was so instructed, and even if the above complete and fair summary of the evidence is

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[7] Hoehn and Whitters' (not "Philip Robertson") "thought" that the plaintiff was not a client was first expressed in their trial testimony not "during the restructuring", as the opinion implies. The jury was, of course, entitled to disbelieve them in favor of the expert witness' testimony to the contrary, and Gaston Snow even admitted that they knew Michael was relying on them to protect his interests, as is specified in (c) above. Michael may not have "request[ed] personal representation", as the court puts it, but he did seek advice and Gaston Snow gave it (see [f] above). The opinion's characterization of "the sample employment agreement" badly skews its actual context (See the evidentiary context summarized on pages 17-20 of plaintiff's brief-in-chief). The facts that "Gaston Snow had no specific contract to represent the plaintiff...and...they billed the corporation" are of little or no materiality to the issue, as the court's own opinions make clear: "the relationship can be implied from the conduct of the parties." Page v. Frazier, 388 Mass. 55 at 62 (1983).

insufficient to convince this court on its de novo review of the second trial that there was an attorney-client relationship, it should be more than sufficient to demonstrate that the jury's finding that there was an attorney-client relationship was not "manifestly" "against the weight of the evidence."[8] Any fair-minded person assessing the actual quantum of evidence (not the court's very incomplete summary) should find the proof compelling, but it is impossible to say that the jury was not warranted to so conclude. It is irrational, and therefore "an abuse of discretion", to have ruled that the jury's decision on this dispositive issue was "manifestly" "against the weight of the evidence." Fairly now

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[8]The evidence of an attorney-client relationship in DeVaux v. American Home Assurance Co., 387 Mass. 814 (1983), upon which the court's opinion principally relies on this point, was gruly gossamer in comparison to this plaintiff's, yet the court held "[t]here is a question of fact for the jury...." Id. at 819. Why this apparent drive to ignore both precedent and evidence?

reviewed, this court must see that Judge Urbano's usurpation of the jury verdict was erroneous--even if the "less deferential" Federal standard of review is eschewed (n. 3, p. 9). (The court's adoption of that compelling standard did seem, however, the reason the court took the case sua sponte, but that is even here eschewed.)

3. Duty to disclose to non-client - Even if the jury were not warranted to find that there was an attorney-client relationship, their finding of liability for non-disclosure was nevertheless warranted. In this case Gaston Snow had a duty to disclose even to Michael as a "nonclient" and it was, admittedly, breached. The court's opinion recognizes (p. 13) that such a duty may be imposed, per Page v. Frazier, 388 Mass. 55 (1983), but that it is "less likely to impose a duty to nonclients" when there is "an independent and potentially conflicting

duty to a client." The court then constructs a totally invalid "conflicting duty" and finds no "foreseeable reliance" by the plaintiff on Gaston Snow's duty to serve the interests of RFI.

What the opinion terms the "three goals in the restructuring" (ps. 4; 13) is most misleading. Those "goals" were extracted from what Gaston Snow entiteld its initial "Preliminary outline", in April (Ex. 20; A. 332). The evidence was uncontradicted, and Gaston Snow admitted, that as the sale plan evolved over the succeeding months C. Stuart impressed two other sine qua non conditions: that there would be on-going "Robertson family control", majority stock ownership, of the "new corporation", and that his sons would continue to be part of the Robertson management.[9] The point is

[9] See footnote 8, page 13, of plaintiff's brief-in-chief for the collected record citations to where those facts were proven over and over again. (Also add Ex. 25, A. 360, to those citations and the admissions on pages 10, 16 and 22 of defendant's brief, as further explicated on page 8 of plaintiff's Reply).

that none of the client's "goals" in the sale and Gaston Snow's duty to disclose to RFI that they had secretly taken Washburn's orders to contravene the two most important conditions, conflicted in any way with Michael's personal interests and Gaston Snow's concomitant duty in these particular circumstances to make those disclosures to him. There was no "conflicting duty"; they totally coincided. The Page caveat does not here apply. Even more relevant is Craig v. Everett M. Brooks Co., 351 Mass. 497 (1967) (distinguished in Page for a reason not applicable in this case), wherein the court impressed a "duty to disclose" to a "nonclient." Gaston Snow's duty to disclose to RFI was of an even plainer degree than the engineer's to the developer in Craig, and since Michael was the Chairman of the Board and a stockholder of RFI his "contemplated reliance on [Gaston Snow's] services", his "identity

[as a] possible plaintiff and the extent of his reliance were known to" Gaston Snow (quoted from Craig on page 64 of Page). Aside from Michael's obvious reliance on Gaston Snow's effectuation of RFI's sale conditions concomitant with his position with RFI, recall that Gaston Snow admitted that they knew Michael was relying on them to protect his personal coinciding interests (see 2. [c] above). Therefore Gaston Snow is liable for the blatant breach of their duty to disclose, even if, as the court said, on page 64 of Page, quoting Rae v. Air-Speed, Inc., 386 Mass. 187, 193 (1982), "recovery under the principles of Craig is limited to instances 'where the defendant knew that the plaintiff would rely on his services'."[10]

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[10]For other opinions of this court recognizing this theory of liability applicable in this case, see Snow v. Merchants National Bank, 309 Mass. 354 at 360 (1941), and recall this court's earlier statement of the precept in Goodwin v. Agassiz, 283 Mass. 358 at 362 (1933):

Even if Michael were a "nonclient", therefore, Gaston Snow owed him a duty to disclose Washburn's secret orders, and the jury was warranted to so find on this evidence as a matter of law. There should have been no second trial.

What Gaston Snow did here was very wrong. But when the court's opinion refuses to follow a clear and long-established constitutional mandate and writes out dispositive uncontradicted evidence to justify those wrongs, reconsideration is imperative.

Respectfully submitted,

*/s/ Daniel F. Featherston, Jr.*
Daniel F. Featherston, Jr.
141 Tremont Street
Boston, MA 02111
(617) 426-4766

CC: The Honorables Paul J. Liacos, Joseph R. Nolan, Neil L. Lynch and Francis P. O'Connor; Richard W. Renehan, Esquire

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Footnote 10 Continued

> Mere silence does not usually amount to a breach of duty, but parties may stand in such relation to each other that an equitable responsibility arises to communicate facts.

No. 89-315

In The

# Supreme Court of the United States

October Term, 1989

MICHAEL S. ROBERTSON,

*Petitioner,*

v.

GASTON SNOW & ELY BARTLETT,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts**

## BRIEF IN OPPOSITION

RICHARD W. RENEHAN,
Counsel of Record
CHARLES R. DOUGHERTY
WILLIAM B. FORBUSH
HILL & BARLOW
One International Place
Boston, MA 02110
(617) 439-3555

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

In an action for legal malpractice and misrepresentation which was re-tried by stipulation without a jury on the written record of the first trial, was there a *per se* violation of the Due Process Clause of the Fourteenth Amendment entitling the plaintiff to a third trial, when (a) after finding for the defendant in the re-trial, the state court granted plaintiff's request for final argument and again found for the defendant and (b) on appeal the plaintiff requested and received a *de novo* review of the record by the state's highest court, which found for the defendant?

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## JURISDICTION

The Petitioner asserts jurisdiction under 28 U.S.C. § 1257(a).[1] As described below, however, the state court of last resort did not reach the federal question presented in the Petition. The state court instead affirmed on an alternative ground by making findings of fact under state law, based upon a *de novo* review of the written record which Petitioner had requested. Accordingly, the Petition should be denied for lack of jurisdiction, in addition to the other grounds described below.

## STATEMENT OF CASE

In 1982, Petitioner Michael S. Robertson commenced a civil action against Respondent Gaston Snow & Ely Bartlett, a law firm, in Suffolk Superior Court of the Commonwealth of Massachusetts. (App. 1-2.) The Petitioner asserted claims of (1) legal malpractice, (2) tortious misrepresentation and nondisclosure, and (3) a violation of the state's unfair trade practices statute, M.G.L. c. 93A. (App. 2.) The case turned upon the question whether an attorney-client relationship existed between the Petitioner and the Respondent under Massachusetts law. (App. 6-13, 16-24.)

A jury found that an attorney-client relationship existed and returned a verdict for the Petitioner on the counts of legal malpractice and misrepresentation/nondisclosure. (App. 2-3.) On the chapter 93A count tried to

[1] The Petition incorrectly cites to the similar predecessor provision, 28 U.S.C. § 1257(3).

the court, however, the judge found that no attorney-client relationship existed and issued a decision for the Respondent. (App. 3.) In the exercise of its discretion, the trial court ordered a new trial on the counts which had been submitted to the jury. (App. 3-4, 13-14.)

By stipulation of the parties, the second trial was conducted without a jury before a different judge based on the written record of the first trial. (App. 4 & n.2, 31.) The trial court reviewed the entire transcript from the first trial, which included both parties' final arguments; the exhibits; certain stipulations; and one additional exhibit. (App. 4, 31-32.) On the basis of this record, the judge found in favor of the Respondent. (App. 4.)

Petitioner filed a motion for a third trial "or other appropriate relief," including a request for argument, based in part on the fact that the trial court issued its decision without hearing final oral argument from the Petitioner in the second trial. (App. 4.) The trial court scheduled and conducted a hearing at which both parties presented final arguments and at which the Petitioner submitted requests for further findings. (App. 4-5.) On the basis of the written record and these final arguments, the court again found for the Respondent. (App. 5, 31-32, 33-34.)

On appeal to the Supreme Judicial Court of the Commonwealth of Massachusetts, the Petitioner argued, *inter alia*, that (a) since the evidence at the second trial was entirely documentary, the Supreme Judicial Court should conduct a *de novo* review of the record and find for the Petitioner, and (b) a third trial on the written record

should be ordered since the trial court did not hear final argument before it issued its initial decision. (App. 5-6.)

After dispensing with two other issues (App. 13-24, 29), the Supreme Judicial Court conducted a *de novo* review of the written record which the parties had agreed to submit as the basis for the second trial. (App. 25-26 & n.7, 30.) Based upon this *de novo* review, the Supreme Judicial Court held, under Massachusetts law, that no attorney-client relationship existed between the Petitioner and the Respondent and that the Petitioner did not sustain his burden of proof on the misrepresentation/nondisclosure claim. (App. 26-28.)

The Supreme Judicial Court explicitly did not reach the question whether the second trial court deprived the Petitioner of due process in a manner requiring a new trial on the written record before a third Superior Court judge. (App. 26 n.7, 30.) Instead, the Supreme Judicial Court held that such a decision was unnecessary because, regardless of the merits of the constitutional claim, its *de novo* review of the written record in effect constituted the third trial which the Petitioner had requested. (App. 26 n.7, 30.)

The Petitioner filed a petition for rehearing "refocus[ing]" its authorities (Petition for Writ of Certiorari at 10), claiming a *per se* constitutional error (App. 35-40), disagreeing with the Supreme Judicial Court's findings of fact based upon the written record (App. 41-53), and demanding another *de novo* trial based upon the same written record before another state trial judge (App. 36, 38 n.1.) The Supreme Judicial Court denied the petition for rehearing.

## SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied. By stipulation, this state tort action was re-tried on the written record of the first trial. On appeal, the Petitioner asserted a due process violation by the trial court and demanded a *de novo* review of the written record by the state's highest court. Without reaching the due process question, the state supreme court granted the Petitioner the process which it demanded. That the Petitioner is unhappy with the findings of fact under state law resulting from that process does not afford grounds for granting a writ of certiorari. *See* 28 U.S.C. § 1257(a); S. Ct. R. 17.1(b), (c).

Even if the state's highest court had not conducted a *de novo* review, there was no violation of due process. The record which the parties agreed to submit to the second trial court as the sole basis for decision included a transcript of the final argument made by the Petitioner in the first trial. When the Petitioner requested final argument after issuance of the initial decision in the second trial, the trial court heard both parties and received requests for additional findings from the Petitioner. These circumstances do not constitute a *per se* violation of the Due Process Clause requiring a third trial under any of the authorities cited by the Petitioner.

## ARGUMENT

### A. Without Reaching the Federal Question, the Supreme Judicial Court Made Findings of Fact Based Upon A De Novo Review, As the Petitioner Requested.

On appeal, the Petitioner asserted a due process violation by the trial court and demanded a *de novo* review and a third trial on the written record. (App. 5-6.) The Supreme Judicial Court of Massachusetts granted the Petitioner's request that it conduct a *de novo* review of the written record, which the parties had stipulated would be the basis for decision. (App. 4-5, 25-26 & n.7, 30.) The state's highest court then made factual findings and reached legal conclusions under Massachusetts law based upon that record. (App. 24-28.) Specifically, the court held that no attorney-client relationship existed between the Petitioner and the Respondent and that the Petitioner failed to meet his burden of proof on the misrepresentation/nondisclosure claim. (App. 26-28.) Accordingly, the Supreme Judicial Court affirmed the judgment for the Respondent. (App. 30.)

The Supreme Judicial Court expressly stated in its opinion that it did not reach the federal constitutional question whether the trial court erred in receiving final oral argument after issuing its initial decision. (App. 26 n.7, 30.) Regardless of the merits of the claim of constitutional error, the court's *de novo* review of the written record in effect gave the Petitioner the third trial on the

written record which he had demanded.[2] (*Id.*) The court then issued its judgment based upon its findings of fact under state law. (App. 6-13, 24-30.)

As evidenced by the Petitioner's concededly "immaterial" complaints about "aberr[ant]" and "skewed" findings of fact by the Supreme Judicial Court of Massachusetts (*see* 28 U.S.C. § 1257(a); Petition for Writ of Certiorari at 11 n.5), the Petitioner is merely unhappy with the results of the *de novo* review which he requested and received. This Petition belies a fanciful hope that a state trial judge in a third trial on the written record would reach a different conclusion than was reached by five Justices of the state's highest court on that same record.

Because the state court of last resort granted the Petitioner the *de novo* review he requested and based its decision upon findings of fact under state law, the Petition for a Writ of Certiorari should be denied. Either jurisdiction is altogether lacking to entertain a writ of certiorari to review the state court's decision which is plainly based upon findings of fact under state law, *see*

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[2] The Petitioner had demanded a third trial on the record before another judge of the Suffolk Superior Court. (*See* App. 5-6, 36, 38 n.1.) The Respondent submits that considerations of fundamental fairness embodied in the Due Process Clause do not require that the Petitioner receive a *de novo* review of the written record by a state trial court judge instead of the *de novo* review which he in fact received from five Justices of the state's highest court. (App. 1.)

*Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (adequate and independent state ground precludes review); *see also Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935); *Utley v. St. Petersburg*, 292 U.S. 106, 111-12 (1934); 28 U.S.C. § 1257(a), or no "special and important reasons" exist for a discretionary grant of a writ of certiorari to review the decision in this state tort action in which the state court of last resort has not "decided a federal question" in conflict with decisions of this Court or other jurisdictions, *see* S. Ct. R. 17.1(b), (c).

### B. The Trial Court's Actions Did Not Constitute a Per Se Violation of the Due Process Clause Requiring a Third Trial.

Even if the Supreme Judicial Court had not conducted a *de novo* review, there was no *per se* violation of due process. The Petitioner asserts that the trial judge violated his purported due process right to closing argument in the jury-waived retrial on a written record. The Petition, however, relies principally upon federal decisions addressing the Sixth Amendment right to counsel, *Herring v. New York*, 422 U.S. 853, 859 (1975) (prohibiting "total denial" of final argument in criminal proceeding); *Powell v. Alabama*, 287 U.S. 45 (1932); *United States v. Spears*, 671 F.2d 991 (7th Cir. 1982); *Patty v. Bordenkircher*, 603 F.2d 587 (6th Cir. 1979); *see also Spence v. State*, 463 A.2d 808 (Md. 1983); *Commonwealth v. Miranda*, 22 Mass. App. 10, 490 N.E.2d 1195 (1986), and upon certain decisions addressing a complete denial of a right to be heard in a civil case, *Hovey v. Elliot*, 167 U.S. 409 (1897); *Windsor*

*v. McVeigh*, 93 U.S. 274 (1896); *Pizer v. Hunt*, 253 Mass. 321, 148 N.E. 801 (1932).

Whatever constitutional right to final argument may exist in a civil jury-waived trial,[3] it was not violated here. The parties stipulated that the re-trial would be submitted on the basis of the documentary record and entire transcript of the first trial (App. 4), which included both parties' final arguments. The second trial court reviewed the entire transcript as the basis for his decision. (App. 31-32.) After receiving the decision in favor of Respondent, the Petitioner moved for a new trial "or other appropriate relief" (App. 4), which included a request for argument. The trial court granted both parties an opportunity for final argument and solicited requests for further findings. (App. 4-5.) *See Herring*, 422 U.S. at 862 (acknowledging that trial courts have broad discretion in controlling duration and limiting content of final argument in criminal action); Mass. R. Civ. P. 51(a) (providing

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[3] The Petition fails to recognize the long line of cases holding that final oral argument in a non-jury civil case is not an absolute right, but a privilege to be exercised under the discretion of the trial court. *Peckham v. Family Loan Co.*, 262 F.2d 422, 425 (5th Cir.) (refusal to grant final oral argument at close of non-jury civil trial was not error), *cert. denied*, 361 U.S. 824 (1959); *Daru v. Martin*, 89Ariz. 373, 363 P.2d 61 (1961); *Gillette v. Gillette*, 180 Cal. App.2d 777, 4 Cal. Rptr. 700, 703-04 (1960); *DeJohn v. American Estate Life Ins. Co.*, 489 P.2d 1065, 1066-67 (Colo. App. 1971); *Pozitzer v. W.R. Martin Co.*, 374 S.W.2d 194, 195 (Ky. 1963); *Fritts v. Fritts*, 11 Md. App. 195, 273 A.2d 648, 649-50 (1971); *Missouri Nat'l Life Ins. Co. v. Mead*, 393 P.2d 521, 524 (Okla. 1964); *Davis v. Dalles Lumber & Mfg. Co.*, 231 Or. 86, 371 P.2d 974, 974-75 (1962); *City of Corpus Christi v. Krause*, 584 S.W.2d 325, 330 (Tex. Civ. App. 1979).

that in jury trials the court may reasonably reduce or extend time for closing argument). The trial court then issued a final decision and entered judgment for the Respondent. (App. 31-32, 33-34.)

Accordingly, in this case, no total denial of final argument occurred. *See Woodbury v. Pfliiger*, 309 N.W.2d 104, 107-08 (N.D. 1981) (conducting final oral argument after issuing initial decision in jury-waived civil trial did not violate due process); *see also id.* at 107 (noting that decisionmaking in bench trial may be enhanced when judge makes initial findings and then solicits argument from counsel). None of the authorities relied upon by the Petitioner dictates a different conclusion in this non-jury civil action tried on a written record. Therefore, even if the Supreme Judicial Court of Massachusetts had decided the federal question it did not reach (App. 26 n.7, 30), its judgment would not have been "in conflict" with decisions of other state courts of last resort, federal courts of appeals, or this Court. *See* S. Ct. R. 17.1(b), (c).

## CONCLUSION

For the reasons stated above, the Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

RICHARD W. RENEHAN,
Counsel of Record
CHARLES R. DOUGHERTY
WILLIAM B. FORBUSH
HILL & BARLOW
One International Place
Boston, MA 02110
(617) 439-3555

Date: September 15, 1989

NO. 89-315

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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MICHAEL S. ROBERTSON,
Petitioner

V.

GASTON SNOW & ELY BARTLETT,
Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

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# REPLY BRIEF

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Counsel of Record:

Francis X. Nee
141 Tremont Street
Boston, MA 02111
(617) 426-4766

Of Counsel:

Daniel F. Featherston, Jr.
141 Tremont Street
Boston, MA 02111
(617) 426-4766

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## REPLY BRIEF

Several incorrect statements of fact and invalid arguments are contained in the brief in opposition. They must be corrected, lest the Court be misled and the cleanly focussed error presented be made to appear less stark or even questionable.

1. There was no "final argument" - The brief in opposition would have the Court believe that there was a comprehensive "final oral argument" before the trial judge (ps. 2, 5, 8 and 9). (A similar implication is contained in the state court's opinion [App. 4-5; 26, n. 7].) Aside from the fundamental fact that there cannot be any constitutionally meaningful "final argument" after final decision, the argument which was had was not comprehensive at all. Counsel argued only for "the narrower matter" of some altered or additional findings and rulings "only for appellate record purposes", which correction

was also made in his Petition For Rehearing below (App. 38-39, n. 1).

2. There was no "de novo review" - On each of the first seven pages of its brief in opposition the respondent states that the Supreme Judicial Court conducted a "de novo review" of the trial evidence and "made factual findings." That is even procedurally doubtful, but, substantively, most incorrect. The court said it was "unnecessary for us to decide if in appropriate circumstances we might depart from the 'clearly erroneous' standard...because, even if we apply the de novo standard, we reach the same conclusions as the trial judge" (App. 25-26). The court then summarized its concurrence on the three most relevant facts, but it does not make "factual findings" in any comprehensive way.

More importantly, and substantively, if the court's "summarized" "relevant evidence" (App. 6-13) be considered to be its "factual

findings" on "de novo review", they are "aberrant" and "skewed" in that the court "totally ignores most of the plaintiff's compelling evidence." Petitioner pointed that out to the Court (Petition at 11, n. 5), referencing the evidentiary delineation of that surprising oversight in argument 2. in the Petition For Rehearing (App. 42-45). Patently, there was no "de novo review" in any meaningful sense (even if any such appellate review were constitutionally relevant, which it is not). As petitioner "[q]uite frankly", but quite accurately, argued in his Petition For Rehearing, "measured against the actual record evidence, the court's summary would constitute unfair, result-oriented, advocacy, much less a judicial presentation" (App. 42).

3. There is no "independent state ground" - The state court did "reach the federal constitutional question" by ruling that its purported "de novo review" cured

the trial judge's denial of final argument (App. 26, n. 7). No appellate court can "not reach" a per se constitutional error presented such as this, of course. The Massachusetts Supreme Judicial Court implicitly "appli[ed] the harmless error rule of Chapman v. California", an invalid prophylactic to a "per se rule", as the Sixth Circuit correctly held in Patty v. BordenKircher, 603 F.2d 587 at 589 (6th Cir. 1979).[1] The court's attempt to make "de novo review" vitiate this per se error does not construct an "independent state ground" to preclude this Court's review.[2]

[1]The Supreme Judicial Court did say in the cited footnote 7 (App. 26) that it was not "deciding whether" there were "a deprivation of due process" ("since our review of the case is, in effect, de novo"), but, of course, it was "deciding...due process" by the very fact that it refused to recognize that this "per se" constitutional error mandated a new trial. The court's supposed de novo review cannot excuse that error, as a matter of constitutional law.

[2]Respondent's citation of this Court's opinions (p. 7), far from supporting its contention that there is an "adequate and independent state ground" in this case, demonstrates that there is not. This

It does not because it cannot. This error is "irremedial", as this Court made plain in Herring v. New York, 422 U.S. 853 (1975). As all courts have since recognized (as did the Herring dissenters), Herring, changed the law; a new trial is the only remedy when final argument is denied.

4. This "per se error" applies to civil cases - The petition demonstrates (ps. 13-18) that this "per se error" clearly applies to both civil and criminal cases, but respondent cites (p. 8, n. 3) what it represents is "the long line of cases holding that final oral argument in a non-jury civil case is not an absolute right", and, impliedly, its denial not "per se error" in

Footnote 2 continued
is made plainest in the most recent case cited: in Harris v. Reed, ___U.S.___, 109 S.Ct. 1038 (1989), the Court reviewed the case law and ruled, on page 1042, quoting from Michigan v. Long, 463 U.S. 1032 (1983), "this Court may reach the federal question on review unless the state court's opinion contains a ' "plain statement" that [its] decision rests upon adequate and independent state grounds'." Here there was no such "plain statement" and the "de novo review" construct is neither "adequate" nor "independent."

a civil non-jury trial. None of those cases (eight state cases and one 1959 Court of Appeals case) may stand, of course, against this Court's explicit opinions to the contrary, most particularly, since Herring v. New York, supra. All nine of respondent's cases turn on the fact that oral argument was denied at a non-jury trial and all of them pre-date Herring, which held, of course, that the due process right to make final argument does apply to non-jury trials.[3] Herring changed the law; the non-jury distinction no longer exists. All appellate courts have specifically recognized that. The petition cites (p. 22) as an example, Commonwealth v. Miranda, 22 Mass.App.Ct. 10

[3]One of respondent's cases, City of Corpus Christi v. Krause, 584 S.W. 2d 325 (Tex. Cir. App. 1979), was decided four years after Herring, but the issue was not argued as constitutional error, Herring was not cited, and the brief passing treatment of the question was disposed of with the citation of one 1910 Texas case. The citation is exemplary of how meaningful is respondent's "long line of cases." None of the nine cases treats the issue in a constitutional law context, and most but very briefly.

490 N.E. 2d 1195 (1986), ironically, one of the more scholarly opinions recognizing Herring's comprehensive new rule of law that even in non-jury cases the denial of final argument is "irremedial" error. To the same effect, also, see Eg. People v. Dougherty, 102 Cal. App. 3d 270 (Cal. Crt. App. 1986) (the "pre-Herring cases...are no longer controlling authority"); State v. Gilman, 489 A. 2d 1100 (Me. 1985) (overruling contrary precedent on the authority of Herring: "we now hold that the denial of the right to present summation [at a jury or non-jury trial] is per se prejudicial").[4]

Respondent's final citation (p. 9) of Woodbury v. Pfliiger, 309 N.W. 2d 104 (N. D. 1981), remains to be disposed of. The case does not hold, as the respondent represents, that "final oral argument after...

[4] In United States v. Cronic, 466 U.S. 648 (1984), this Court cited Herring as an example of "constitutional error without [the need for] any showing of prejudice." Id. at 659, n. 25.

decision...can cure the due process violation." Counsel was there held to have waived final argument (Herring recognizes that waiver obviates any error) by not having requested final argument (a requirement of North Dakota law). Counsel also only wanted to bring certain legal authorities to the court's attention, was allowed to do so, hence there was no "denial of due process." Id. at 108. The case does not support the Massachusetts Supreme Judicial Court's attempt to avoid this "per se error."[5] It's decision is aberrational and "in conflict with decisions of this Court", "another state court of last resort...[and] federal court[s] of appeals." Rule 17.1(b) and (c). Hopefully, the Court can perceive that respondent's Brief In Opposition is a "sand in the air"

[5]North Dakota law in fact, recognizes the fundamental error here presented: "...litigants in civil nonjury cases...have a right to have their attorneys make a final argument...it cannot be totally denied." Fuhrman v. Fuhrman, 254 N.W. 2d 97 at 101 (N.D. 1977).

exercise--an effort to have the "per se error presented appear less stark than it actually is.

The unreality of any post-decision argument or "de facto review" curative was thusly recognized in People v. Dougherty, supra, at 280: "totally unrealistic....The bell having rung cannot be unrung (see The Rubaiyat of Omar Khayyam, stanza 72)."

Respectfully submitted,

Francis X. Nee
141 Tremont Street
Boston, Massachusetts 02111
(617) 426-4766

Of Counsel:

Daniel F. Featherston, Jr.

DATED: September 25, 1989